(3)

No. 89-482

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

BARBARA ANN WASHINGTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR CHRISTA M. WASHINGTON, A MINOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-482

UNITED STATES OF AMERICA, PETITIONER

v.

BARBARA ANN WASHINGTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR CHRISTA M. WASHINGTON, A MINOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondent devotes virtually all of her brief in opposition (at 7-22) to the argument that the petition for a writ of certiorari presents this Court with a question of state law. But this is precisely what the petition does *not* do. Rather, we ask this Court to review an important question of federal law and to remand the case for consideration of the remaining state law issue under the appropriate federal standard.

As pointed out in our petition (at 6-8), the decision below is one of a series of three Ninth Circuit

decisions under the Federal Tort Claims Act in which the liability of the United States has been predicated solely on the determination that the injury occurred on a military base and was caused by military personnel acting in violation of a base regulation.[1] In none of the three cases did the conduct of the military personnel occur while they were on duty or relate to the performance of their military duties. Rather, in each case, the injuries arose as a result of acts or omissions of the service members while engaged in personal affairs.

In the first of these cases—*Lutz* v. *United States*—the Ninth Circuit based its conclusion on its observation that "[m]ilitary housing presents a unique situation." 685 F.2d at 1183. In light of that unique quality, the court concluded, "the employment relationship of residents of military bases continues even during the off-duty at-home hours." *Ibid.* That rationale was expressly relied upon by the Ninth Circuit both in this case (Pet. App. 5a-6a) and in *Doggett* v. *United States* (875 F.2d at 688).

It is that rationale that we ask this Court to reject because it constitutes an erroneous application of the Federal Tort Claims Act. In the first place, in its emphasis on the "uniqueness" of military bases, the Ninth Circuit ignores both the analogous situations that arise in the private sector and the clear command of the FTCA that liability may be based only

---

[1] The other two decisions are *Doggett* v. *United States*, 875 F.2d 684, 688 (9th Cir. 1989) (that part of the opinion dealing with government liability for the conduct of personnel who were drinking while off duty), and *Lutz* v. *United States*, 685 F.2d 1178 (9th Cir. 1982) (airman's failure to control his pet dog). In *Doggett*, as in the present case, the events took place in California; in *Lutz*, they took place in Montana.

on a determination that a private person would be liable in similar circumstances under state law. 28 U.S.C. 1346(b), 2674. Moreover, it disregards the express insistence of Congress, in 28 U.S.C. 2671, that a military employee is *not* to be treated differently from an employee in the private sector; actions held to be "within the scope of his office or employment" are to be limited to actions taken in the "line of duty." Finally, by failing to distinguish between the military's role as administrator of a community in which service members and their families lead private lives and its role as employer of the service members themselves, the court below has effectively made the United States an insurer of compliance with every rule and regulation governing life on military bases. No such insurance function was intended by the FTCA's limited waiver of sovereign immunity.

Once this error has been remedied, the case should be remanded for application of controlling state law under the proper standard—a standard free from any notion that liability can or should be premised on the "unique" nature of a military base. In our view, the district court was correct in concluding (Pet. App. 13a-14a) that the outcome under state law is clear: the United States is not liable for any negligence in this case under the doctrine of *respondeat superior*. But the question of state law is not one that needs to be addressed by this Court.[2]

---

[2] As noted in our petition (at 7 n.3), the court below cited only one state case, at the outset of its discussion, and cited it only for the general scope of *respondeat superior* liability under state law. Moreover, in that case, *Jeffrey Scott E.* v. *Central Baptist Church*, 197 Cal. App. 3d 718, 243 Cal. Rptr. 128 (1988), the court held that a teacher's employer was *not* liable for the teacher's sexual abuse of a student. Although

2. We indicated in our petition (at 9-11) that the rationale of the court below—relying as it did solely on the violation of a base regulation by the service-

---

the court below never went beyond this citation in its discussion of state law, respondent attempts in its brief in opposition to set forth three separate theories for imposing liability under state law. Like the court of appeals, respondent has failed to cite a single analogous state case holding a defendant liable in tort.

Respondent's first theory—that the employment duties of military personnel extend to compliance with *all* base rules and regulations—relies principally on the state's "bunkhouse rule" (see Br. in Opp. 14-15). But that rule was developed in the context of state workers' compensation laws and has never been applied in the *respondeat superior* context. See *Martinez* v. *Hagopian*, 182 Cal. App. 3d 1223, 227 Cal. Rptr. 763 (1986), relied on by the district court in this case (see Pet. App. 14a). Moreover, the California Supreme Court has emphasized that the tests of liability under workers' compensation law and tort law are "not identical," and that workers' compensation cases are therefore "not controlling precedent" in resolving a *respondeat superior* question. *Perez* v. *Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 967 n.2, 719 P.2d 676, 227 Cal. Rptr. 106, 108 n.2 (1986).

Respondent's second theory—which relies on an assessment of the risks inherent in the employer's enterprise—was squarely held by the district court to be inapplicable here "because there [was] not a sufficient nexus between the employment of Cleaves and Bartole [the servicemen involved] and their act of priming the carburetor." Pet. App. 13a. Respondent cites no authority under state law that suggests the contrary in an analogous situation, while the district court's holding is strongly supported by *Martinez*.

Finally, respondent's third theory—that the United States is directly liable as a landowner on whose property dangerous activities took place—is not a theory based on *respondeat superior* at all. It was rejected by the district court on the facts of this case (Pet. App. 14a-15a), and was not adverted to by the court of appeals.

men involved—was squarely in conflict with the rationale of the District of Columbia Circuit in *Nelson* v. *United States*, 838 F.2d 1280 (1988). The Ninth Circuit's rationale is now also in conflict with both the reasoning and the result of the Eighth Circuit's decision in *Piper* v. *United States*, No. 88-2612 (Oct. 10, 1989), *reprinted in* App., *infra*, 1a-7a. Like *Lutz* and *Nelson*, that case involved an action against the United States by a dog-bite victim. The court of appeals, reversing the district court (which had relied on Ninth Circuit precedent), held that "[w]hile this case factually resembles the *Lutz* case, we decline to follow it. Instead we adopt the reasoning of another similar case, *Nelson* v. *United States*." *Id.* at 5a. The court then went on to say: "Military bases regulate a wide variety of subjects, some of them trivial, such as housekeeping. It stretches the statute too far to say that any act or omission by a servicemember, if covered by a regulation, represents conduct in the line of duty." *Id.* at 6a. Finally, the court quoted at some length from the *Nelson* opinion, emphasizing that in its capacity of running what is, in essence, a "company town," the military "imposes many duties on military personnel, not all of which are plausibly viewed as imposed by the government in its role as employer." *Ibid.* (quoting *Nelson*, 838 F.2d at 1283).[3]

The question presented in this case could as easily have arisen if an off-duty service member, while at home, had caused injury by violating a base regula-

[3] After holding that the United States was not responsible for any negligence on the part of the serviceman who owned the dog, the court in *Piper* remanded the case to the district court to determine whether other base personnel may have been negligent in the performance of their job-related duties.

tion prohibiting smoking in bed (see App, *infra*, 6a) or banning the attachment of extension cords to coffeemakers (see Pet. 11 n.11). The question in those instances, as in this one, is whether the mere existence of a base regulation, regardless of its nature or function or the circumstances of its application, makes the United States the insurer of compliance with that regulation by military personnel. There is a conflict in the circuits on that question.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

NOVEMBER 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2612

JUNE D. PIPER, as Mother and Guardian of Matthew D. Durran, a Minor, APPELLEE,

v.

UNITED STATES OF AMERICA, APPELLANT.

Submitted: June 16, 1989
Filed: October 10, 1989

Appeal from the United States District Court
for the Eastern District of Arkansas

Before BEAM, Circuit Judge, HEANEY and BRIGHT, Senior Circuit Judges.

BRIGHT, Senior Circuit Judge.

The United States appeals the district court's judgment awarding damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982), for dog-bite wounds sustained by Matthew Durran, age eleven, while residing on a military base. The

district court held the Government liable for the negligence of a servicemember, TSgt. Robert Williams, who permitted his dog to run free in violation of regulations promulgated by the Little Rock (Arkansas) Air Force Base.[1] The district court ruled that Williams' responsibility to control his pet was within the scope of his employment in the military and rendered the United States liable on a respondeat superior theory. On appeal the United States asserts that TSgt. Williams did not act within the scope of his employment when he neglected to keep his dog under control at his personal residence. We agree with the Government's position and reverse and vacate the judgment, but remand for a determination of whether other grounds exist to support the award of damages.

I. BACKGROUND

At the time of the incident, Matthew Durran lived with his mother, June Piper, a National Guard enlisted person, at Little Rock Air Force Base (LRAFB). TSgt. Robert Williams, the owner of a large Airedale dog named Arby, lived nearby.

On the afternoon of January 18, 1986, Matthew returned from school on the bus and saw Arby in his backyard, sitting at the rear patio glass door and barking at the dogs in the house. Matthew called for the dog to follow him towards its own home. The dog attacked Matthew, knocked him to the ground and bit him on the forehead and around the scalp. The school bus driver, witnessing the incident, sounded her horn and the dog ran away. The bus

---

[1] The opinion of the district court is reported. *Piper* v. *United States*, 694 F. Supp. 614 (E.D. Ark. 1988).

driver then administered first aid to Matthew and called for an ambulance.

Matthew suffered considerable pain during and after the attack. He received several lacerations and puncture wounds on his head requiring treatment and approximately eight follow-up visits. The attack left scars on Matthew's head and resulted in some temporary emotional damage.

The attack on Matthew did not represent Arby's first attack upon a person or the dog owner's first failure to control the dog. On January 11, 1985, one year prior to the attack on Matthew, airbase security police found Arby running at large and cited TSgt. Williams for failing to control his dog. As a result, the commanding officer verbally counseled TSgt. Williams on the need to control his pet.

On January 26, 1985, Arby bit three-year old LeChelle Stimson through the nose while she visited in TSgt. Williams' home. Although no one witnessed the incident, LeChelle's father told the security police that the dog bit the child when she pulled its whiskers. TSgt. Williams again received verbal counseling on the need to control his dog, but the security police did not report the incident as a nuisance, relying on the father's statement that LeChelle had provoked the dog.

On March 30, 1985, Arby bit one of Williams' sons at the Williams' home. Williams reported this incident to the base veterinarian who recorded it in a log book, but took no further action. The district court found that the veterinarian did not report the incident to security police because the veterinarian considered the incident a private matter.

Base regulations permit pets on the base as long as they do not become a nuisance, are not allowed to

run free and are under the control of the owner at all times. LRAFB Regulation 125-2 (May 20, 1981). The base commander, security police and pet owner share responsibility for enforcing this regulation. The regulation further requires that any pet reported twice as a nuisance be removed from the base. Evidence in the record also suggests that emergency room personnel are required to report all dog-bite incidents to the security police, but the district court made no specific finding in this regard.

The district court found that Arby did not habitually run free, but noted that the evidence conflicted on this point. The court also found that except for the three biting incidents, no evidence indicated that the dog had exhibited aggressive or vicious tendencies.

Matthew's mother, who brought the suit on behalf of Matthew, argued that the Government was liable under the FTCA, on either of two theories. First, Mrs. Piper contended that TSgt. Williams had acted negligently in the line of duty by failing to maintain control over Arby. Second, Mrs. Piper contended that airbase personnel responsible for maintaining order on the base had negligently permitted Arby to remain on the base when they knew or should have known of his dangerous propensities.

After a three-day bench trial, the district court found for Matthew and entered an award of damages in the amount of $9,600. As we have already mentioned, the court held TSgt. Williams acted in the line of duty because base regulations delegated to him the duty to control his dog. The district court relied on *Lutz v. United States*, 685 F.2d 1178 (9th Cir. 1982), a factually similar case, for this proposition of law. The trial court determined that violation

of LRAFB Regulation 125-2 (relating to control of pets) by Williams amounted to negligence in the line of duty and held the United States liable under the FTCA. The district court did not decide whether the United States could be liable for the negligence of other airbase personnel in duties relating to control of animals.

II. DISCUSSION

While this case factually resembles the *Lutz* case, we decline to follow it. Instead, we adopt the reasoning of another similar case, *Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988), where the court held that an owner's failure to control his pet dog did not occur in the line of duty.

As a preliminary matter, we observe that the FTCA waives the Government's immunity to suit only for personal injuries caused by government employees acting within the scope of their employment. 28 U.S.C. § 1346(b). Military employees are within the scope of employment when they act in "the line of duty." 28 U.S.C. § 2671. "Line of duty" takes its meaning from the applicable state law of respondeat superior. *Williams v. United States*, 350 U.S. 857 (1955) (per curiam). Under Arkansas law an employee acts within the scope of employment or in the line of duty when he acts for his employer's benefit or furthers his employer's interest. *Orkin Exterminating Co. v. Wheeling Pipeline, Inc.*, 263 Ark. 711, 567 S.W.2d 117 (1978).

Borrowing the rationale from the *Lutz* case, the district court reasoned that TSgt. Williams had been delegated a duty to control his dog because of regulations relating to control of pets and because violation of these regulations subjects servicemembers to dis-

cipline. That court concluded that Williams' failure to control the dog therefore occurred in the line of duty.

This reasoning will not stand. Military bases regulate a wide variety of subjects, some of them trivial, such as housekeeping. It stretches the statute too far to say that any act or omission by a servicemember, if covered by a regulation, represents conduct in the line of duty. *Nelson*, 838 F.2d at 1283-84. In this case and in many cases, connection between the duty imposed by the regulation and military service is far too tenuous to conclude that the FTCA applies. As the District of Columbia Circuit observed:

> Under *Lutz*, all duties imposed by military regulation, no matter how trivial, could fall within the serviceman's line of duty and thus within the employer-employee relationship. In the unique context of life on a military base, however, the government is much like an old-fashion "company town." Within this multi-faceted relationship, the military imposes many duties on military personnel, not all of which are plausibly viewed as imposed by the government in its role as employer.
>
> Bolling Air Force Base regulations, for example, require base residents to use certain size pots and pans, to replace electrical fuses, and to refrain from smoking in bed. These duties are not imposed by the military in its role as an employer and they do not run to the employer's benefit. Rather, they are incidental regulations designed to ensure that the base functions under conditions of common consideration and orderliness that enhance community life; as such, they are designed to benefit all residents of the hous-

> ing community. Because such duties, although established by military regulations, do not run to the benefit of the employer and are linked only incidentally with the employment relationship, they cannot be said to be discharged within the scope of employment.

Id. at 1283-84. We believe this analysis is sound and adopt it. Accordingly, the United States is not derivatively liable under the FTCA for negligence on the part of TSgt. Williams.

There is, however, another theory on which the Government might be liable. The district court heard evidence but did not decide whether other air base personnel negligently performed their duties. *Cf. Nelson*, 838 F.2d 1284-87. We cannot say from the record before us whether the commanding officer, security police or the veterinarian knew or should have known of the potential threat posed by Arby. On remand, however, the district court should decide this issue on the present record or it may permit the parties to introduce additional evidence on this issue.

III. CONCLUSION

Accordingly, we reverse the judgment of the district court and remand for a determination of whether there are other grounds to support the award of damages in favor of Matthew.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 262203 615